

### Dealing With China in the South China Sea: Duterte Changing Course

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# PRIF REPORT

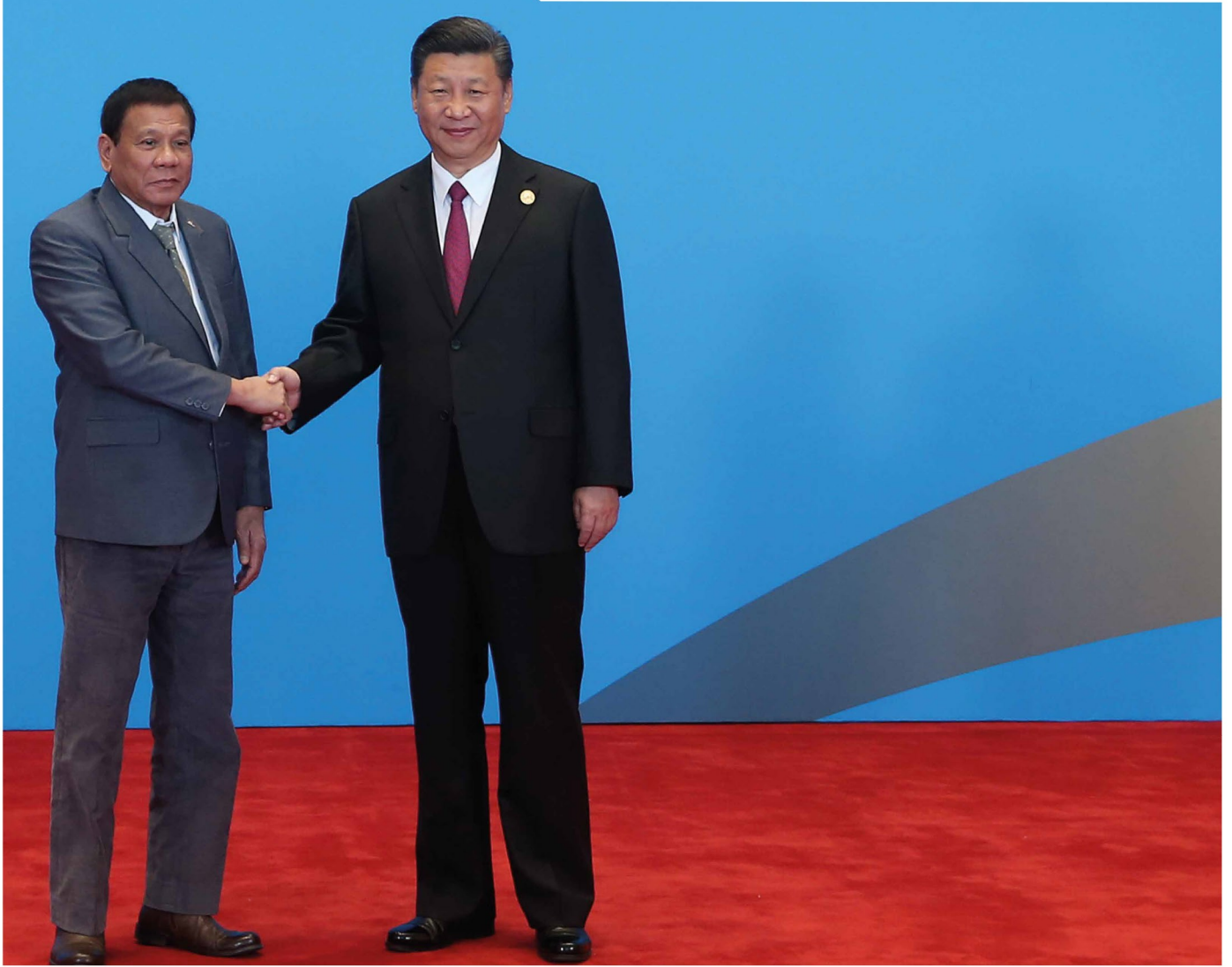
PEACE RESEARCH INSTITUTE FRANKFURT / LEIBNIZ-INSTITUT HESSISCHE STIFTUNG FRIEDENS- UND KONFLIKTFORSCHUNG

## 国际合作高峰论坛 FOR INTERNATIONAL COOPERATION

PETER KREUZER //

**DEALING WITH CHINA IN THE SOUTH**

**CHINA SEA: DUTERTE CHANGING COURSE**



PRIF Report 3/2018

## **DEALING WITH CHINA IN THE SOUTH CHINA SEA**

DUTERTE CHANGING COURSE

PETER KREUZER //

LEIBNIZ-INSTITUT HESSISCHE STIFTUNG FRIEDENS- UND KONFLIKTFORSCHUNG (HSFK)  
PEACE RESEARCH INSTITUTE FRANKFURT (PRIF)

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Chinese President Xi Jinping welcomes Philippine President Rodrigo Duterte before the Leaders' Roundtable Summit of the Belt and Road Forum (BRF) for International Cooperation at Yanqi Lake;  
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Recapitulating the developments of the past years of escalation and the surprisingly successful de-escalation of Sino-Philippine relations since mid-2016, this report ponders the broader question of how to deal prudently with an assertive China in the South China Sea.

From 2011 to 2016 the multilateral conflict over territorial sovereignty and maritime rights in the South China Sea intensified dramatically. At its core are China and the Philippines, since the latter took the unprecedented step of bringing a case before the Permanent Court of Arbitration (PCA) against China in early 2013, against the express desire of its opponent.

The aftermath of this step was that bilateral relations chilled to an all-time-low, with China retaliating by escalating its activity in the disputed areas: small low-tide elevations were transformed into huge artificial islands and equipped with fortified harbors and airports that massively extend the operational capacity of the Chinese Navy and Airforce. The Philippines in turn were highly successful in gathering political support from leading democracies, and also managed to strengthen their security ties with its old ally, the United States, and establish new ones with other regional powers, foremost among them Japan and Australia.

The PCA finally rendered its award in July 2016 using language even more strongly opposed to the Chinese claims than most observers had anticipated. China lost almost all its maritime claims in the disputed regions of the South China Sea. It is hardly surprising that the award was perceived as vindicating the Philippine strategy of resorting to international law in order to prevail in the dispute over sovereignty and sovereign rights with China by the Philippine administration of Benigno Aquino and its western supporters alike.

This report largely follows the assessment of the new Philippine administration of Rodrigo Duterte which took office almost simultaneously with the PCA ruling in the summer of 2016. It concludes that the Philippine strategy of publicly confronting China through the unilateral seising of the Permanent Court of Arbitration prompted Chinese assertiveness and most probably contributed to the Chinese decision to pursue its great-power ambitions in a more drastic way. Thus, it was clearly unsuccessful, if the aim was either to stop Chinese assertiveness, lessen the threat of escalation or get closer to resolving the conflict. It was also highly problematic insofar as it undermined one of the scarcest resources in this complex conflict: mutual trust. While perfectly legal, the Philippine strategy should be understood as an act of *lawfare*, insofar as it breached the informal agreement of regional claimants not to turn to external mechanisms of conflict resolution as well as a normative precondition of arbitration as a consensual step of competing claimants.

Had the current Philippine government remained in office, the chances of further escalation would have been substantial. China would most probably have further advanced its strategy of establishing new facts on the ground in the form of artificial islands that have huge military airports and harbors, and simultaneously aggressively denied the Philippines access to vast stretches of the sea it claimed for itself.

Yet, two weeks before the PCA award, the new Philippine President Duterte, who immediately shifted course and offered to mend fences with China, was inaugurated. His offer to ignore the award for the time being enabled China to respond in kind without loss of face or admission of defeat.

Since then, the all but broken down bilateral communication channels have been re-established from the top-level to track-two, economic relations have intensified, China has become an important partner and source of loans for the Philippine development program focused on infrastructure, the situation on the ground in the contested areas has eased significantly and guarded optimism with respect to the eventual *peacefulness* of China's rise has returned to the region.

This report argues that the PCA-award was important as it imposed serious and rising reputational costs on China. If the Philippines had pressed its case further, China would either have had to continue its aggressive stance on the ground or publicly concede defeat (a nearly inconceivable scenario). This threat of worsening reputational costs was one important precondition for China to respond positively to the Duterte initiative.

For the immediate future, it is crucial to keep alive the memory of the costs associated with as well as the limitations of the strategies of mutual if asymmetric assertiveness that triggered the policy shift. In the longer run, substantial progress in institutionalizing working mechanisms for sustainable conflict management that develop and implement mutually recognized regulations for core practical problems of peaceful coexistence in a contested area must be established – from fishery regulations to environmental standards and non-traditional security threats.

One crucial lesson from the analysis of past dynamics is that premature and unilateral efforts at conflict resolution through the application of legal instruments may actually increase the opponent's resistance and thereby escalate conflict dynamics. This holds all the more true the more the invocation of international arbitration (or other legal instruments) can be perceived as a strategic move aimed at winning a contest through law that cannot be won otherwise. Under such circumstances heightened resistance is to be expected from the opposing party as it perceives the other's move as *lawfare* or the use of law as a weapon of war.

The second lesson is that China's behavior can be influenced through strategies that respond in a positive way to its core needs and predicaments and thus provide incentives for the lessening of asserting power unilaterally.

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## 1. INTRODUCTION

This report addresses the question of how to deal prudently with China in the South China Sea (SCS). While the conflict over territorial sovereignty and maritime rights in the South China Sea pits a number of claimants against each other, the conflict between the People's Republic of China (PRC) and the Philippines had attracted the most international attention during the past years until the summer of 2016, because the Philippines took the unprecedented step of extending its conflict with China to the sphere of the international judiciary in 2013. This unprecedented Philippine move was seen by China as an outright challenge, to which it responded with highly assertive steps on the ground in the South China Sea.

The ensuing escalation was abruptly superseded in mid-2016 by a policy of mutual accommodation after the new Philippine government under President Duterte decided to abruptly replace a confrontational stance with a conciliatory approach towards China.

Chinese assertiveness is taken as a given in much of the literature. The standard advice for China's opponents is to take a principled stance based on the rule of law and resort to external balancing. This report argues that Chinese assertiveness has actually fluctuated during the past decades and that these fluctuations are strongly influenced by the strategy utilized by China's opponents for dealing with the conflict. This strategy has involved conciliatory gestures that recognize Chinese core needs and predicaments and thus also provide incentives that allow China to reciprocate by reducing its assertiveness and focus on non-competitive dimensions of bilateral relations. Neither strategy seems to be able to provide a solution to the territorial and maritime conflicts. However, whereas the former widens the sphere and level of contention and thereby the threat of militarized disputes, the latter leads to enhanced relations that embed the conflictual dimension within a cooperative environment, lessening threats of mutual escalation as a result.

Under President Aquino (2010–2016) the Philippines decided to counter perceived Chinese assertiveness by means of principled opposition through the internationalization of the conflict and by strengthening external balancing by forging closer security ties with the United States and Australia as well as Japan. Most important was the Philippine decision to unilaterally invoke the Permanent Court of Arbitration (PCA)<sup>1</sup> to rule on a number of questions that would in the worst case all but obliterate the vast Chinese sovereignty claims on much of the South China Sea.

In July 2016 the PCA rendered its award that not only nullified the ill-defined Chinese claims resting on its *nine-dash line* that encompasses most of the South China Sea (see map below p. 5), but also stated that none of the various elevations in the South China Sea qualifies as an island in a legal sense. As a result, all potential claims to vast exclusive economic zones (EEZ) of 200 nautical miles (NM), based on the control of *islands*, were rendered null and void.

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1 Strictly speaking the PCA is not in itself a judicial body. It "consists of an International Bureau which acts as a registry and provides an administrative structure for arbitral tribunals. The PCA also maintains a list of arbitrators, compiled by the States parties to the Convention, which is designed to assist State parties in the selection of international arbitrators" (Malintoppi 2006: 134).

Whereas the decision of the PCA was perceived as a resounding victory by the Aquino government, it was an outright failure to the newly elected Duterte administration due to the tremendous attendant costs. The Aquino strategy did not prevent China from further asserting its claims in the South China Sea, where it established a number of huge artificial islands from 2014 onwards, several of which have been equipped with airports and harbors that are able to accommodate modern fighter jets, bombers and warships. Further, there was no feasible option for the Philippines to enforce the ruling without running the risk of militarizing the dispute. Finally, the Philippines seemed to have lost out economically due to its hardline stance during the years of confrontation.

The new Philippine government under President Duterte decided to revive and extend the strategy employed by the government of Gloria Macapagal Arroyo (2001–2010) that focused on downplaying the conflict and embedding it in a broad array of cooperative activities and enhanced economic relations. It thus signaled that it would return to developing sustainable conflict management mechanisms geared towards reducing the danger of escalatory dynamics and establishing an overall cooperative framework in which the conflict can be securely embedded.

While China clearly won on the ground as Philippine external balancing proved unable to prevent Chinese island building and militarization, the massive acts of unilateral assertion resulted in rising costs. These forays severely damaged China's international reputation, amplified regional mistrust of Chinese intentions in the Southeast Asian region, and strengthened bonds between the Philippines and external powers. To China the Philippine initiative for re-establishing amicable relations signaled a window of opportunity to escape from the costly dynamics of escalation that had dominated the preceding years. By promising to ignore the PCA ruling for the time being Duterte allowed China to change course and de-escalate its conflict behavior without having to admit defeat in arbitration.

The results of this initial shift and subsequent developments have been promising, with an at least temporary freezing of the conflict and its being embedded in an overarching cooperative framework that centers on economic cooperation and a new role for China as a crucial partner in Philippine development.

It is argued that the Philippine success in the PCA arbitration was a necessary precondition for the relatively positive Chinese response to the Duterte initiative. It directly and indirectly occasioned rising costs for China that made it amenable to a reduction of assertiveness. However, had the Philippines continued along the established policy line of exposing China as an international bully contravening international law after the PCA award of July 2016 it would have aggravated the already tense situation. Continuing along the Aquino line would have in all probability then resulted in extended and rising confrontation, as the only way out for China would have required conceding defeat. Consequently, the Duterte shift was equally necessary in order to be able to defuse and step away from mutual confrontation. However, the Duterte strategy of *embracing* China would have had less effect in the absence of the preceding arbitration, given that China would then not have felt the pain associated with its otherwise rather successful assertiveness on the ground.

The analysis below will show that unilateral efforts at enforced conflict resolution against the expressed will of a powerful opponent are not only bound to fail. They are actually likely to increase the opponent's resistance and the threat of a conflict spiraling out of control, even though in this specific case they also created an incentive for the big power to respond positively to signals for change advanced by the lesser power.

The detailed analysis will proceed along the following lines: Chapter 2 establishes core strategies of Philippine conflict management during the earlier decades of the territorial conflict up to the escalation from approximately 2011 onwards. The following two chapters provide detailed analyses of the dynamics of escalation from 2011 to June 2016 and the subsequent shift to much enhanced bilateral relations from mid-2016 onwards. The final chapter 4 will discuss the chances and limitations of what Chinese Foreign Minister Wang Yi hailed as the current "golden period of fast development" of bilateral relations (Shepherd 2017).

## **2. THE BACKGROUND TO THE ESCALATION UNDER BENIGNO AQUINO**

### **2.1 IGNORING EVER MORE FORCEFUL CHINESE MOVES DURING THE COLD WAR**

The conflict on sovereignty over the islands and sovereign rights in the South China Sea extends back to the 1940s. For the past decades the People's Republic of China (PRC), the Republic of China on Taiwan (ROC), Vietnam, the Philippines, Malaysia and Brunei have claimed larger or smaller portions of the sea. The multitude of overlapping claims to exclusive ownership or control transformed the conflict into one of the most intractable of the past decades, which however only escalated in the 1990s, when China finally joined the struggle for control of islands, reefs, rocks and other elevations in the Spratly Islands off the east coast of the Philippines.

The first Chinese move in the Spratly Islands occurred in 1946, when two ships of the Republic of China (ROC) sailed to the largest of its islands, renamed it *Tai ping Dao* and departed. In the same year Philippine President Elpidio Quirino declared that the Philippines perceived the Spratlys as vital to its security and would hence claim it<sup>2</sup>. However, during the following years government action seemed to signal the opposite, with no claim brought forward up to 1956. At that time a Philippine national, Tomás Cloma, (without government endorsement) claimed much of the Spratly Island territory for himself on the right of discovery as *terra nullius*. Philippine President Magsaysay denied that this meant that the Philippines had claimed the islands. Despite this, both the Republic of China (ROC) and the People's Republic of China (PRC) reacted. The first by permanently occupying Taiping Island and the second by strong protests at any infringements of its sovereignty claims.

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2 One of the core bases for the following presentation of the chronology of early decades of the conflict is Hayton 2014.

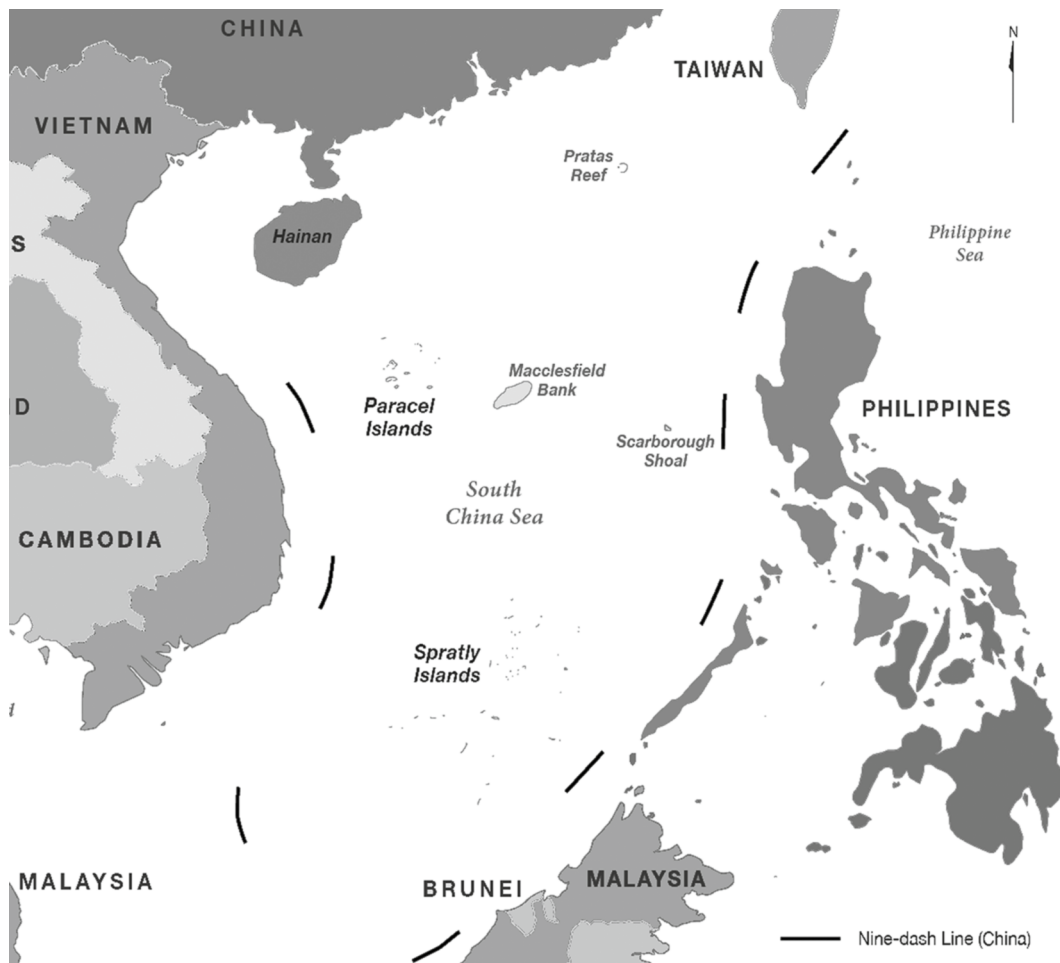


Fig. 1: The South China Sea (Source: CartoGIS services, College of Asia and the Pacific, The Australian National University - South China Sea in color (<http://asiapacific.anu.edu.au/maponline/base-maps/islands-south-china-sea>), converted to black and white (grayscale))

Afterwards the islands were all but forgotten until the *oil rush* of the early 1970s, when oil exploration off the coast of Palawan spurred the idea of subsea riches that might be claimed for the Philippines. In 1971 the Philippines occupied several elevations in the Spratly Islands, and tried to establish a legally defensible claim. In 1974 Philippine dictator Ferdinand Marcos coerced Cloma into signing over his *Freedomland* (Kalayaan) to the Philippine state. One year earlier, (South) Vietnamese troops were deployed to the Spratlys. Shortly afterwards, the PRC raided and took control of the Western Paracel islands held by South Vietnam. The South Vietnamese response was to occupy additional elevations in the Spratlys, all of which were taken over by the Vietnamese government after the Communist victory in 1975. In the late 1970s both Malaysia and the Philippines (Presidential Decree No. 1599, 1978) formally established their claims to an exclusive economic zone of 200 nautical miles. Following the first expedition of Chinese survey ships into Malaysian claimed waters in 1983, Malaysia occupied several islands to strengthen its claim.

It was only then that the People's Republic of China decided to become active on the ground. Under the pretext of establishing monitoring stations, it established a presence on several elevations in the Spratlys, in one case resulting in an armed conflict with Vietnamese troops. What would have resulted in an uproar in later times seems to have hardly bothered the Philippine leadership at that time, with an anonymous government official being quoted as saying that this was not going to be an issue in the then upcoming visit of Philippine President Corazon Aquino to China (See Manila Standard March 16, 1988, p. 6). Philippine journalists even accepted that "both China and Vietnam have ancient and historical claims to the Spratly [...] island group" and qualified the Philippine stance as "territorial adventurism" (Balthazar 1988).

## **2.2 THE POST-COLD-WAR AND POST-TIANANMEN SHIFT: CHINA AS A PROSPECTIVE ENEMY UNDER RAMOS**

The late 1980s saw two developments that changed Western perceptions of China: the end of the Cold War with the crumbling of the Warsaw Pact and a massacre, when the Chinese regime forcibly suppressed large scale demonstrations on Tiananmen Square in Beijing, resulting in high numbers of civilian deaths. Western reaction was drastic with economic sanctions and an arms embargo put into place against China (see for example: Rennack 2006). The role of the Tiananmen massacre in reframing Western perceptions of the rise of China can hardly be overestimated. It was the crucial trigger that switched Western perceptions of China from potential friend and ally to a potential enemy that violated human rights and to a contender for global hegemony.

Against this backdrop the first real crisis developed in the early to mid-1990s, when the new Philippine government of President Fidel Ramos first voiced plans to convert two of the Spratly islands into diving spots. Several Chinese fishermen were arrested by the Philippine navy for illegal poaching, and the Philippine government authorized a research vessel operated by the Philippine Navy to survey for marine resources in the disputed territories (Carlito 1993; AFP 1993; Business World 1993). Initial Chinese reactions were conciliatory. Seeking a face-saving compromise, Chinese officials indicated their interest in joint management and development of subsea resources (Manila Bulletin 1993). The Chinese position hardened after Ramos underscored the Philippines' close links with the United States and also explicitly "welcomed America's determination to oppose any resort to the use of force in the Kalayaan or Spratly area" (The American Presidency Project 1993).

In early 1995 it became known that China had occupied a further elevation, Mischief Reef, much nearer to Philippine metropolitan territory than those it had hitherto controlled. This time, the "reaction in Manila was furious" (Hayton 2014: 86). Manila opted for a strategy of internationalization and moral outrage, aimed at humiliating China as a belligerent Goliath, warning against the "Tibetization" of the South China Sea and that China's actions "may invite diplomatic quarantine reminiscent of world reaction to the massacre of students and workers at Tian'anmen Square some years."<sup>3</sup> In this way the Ramos government symbolically transformed the conflict over sovereignty into one between

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3 Philippine politicians quoted in: Kreuzer 2016, p. 260; see also Kreuzer 2015.

democracy and its opponents. In line with this, Ferdinand Ramos threatened authoritarian regimes with their downfall at the hands of the United States (Ramos 1995).

Yet, it is important to note that the Ramos government, despite this hardline stance, maintained bilateral communication channels. This eventually resulted in a bilateral code of conduct (COC), as well as in a bilateral meeting between the two presidents, Ramos and Jiang Zemin, in November 1995 and 1996 on the sidelines of the APEC (Asian-Pacific Economic Cooperation) Forum. The negotiations, the bilateral COC as well as the subsequent bilateral meeting of top leaders signaled that the Philippines still tacitly accepted the Chinese framework for conflict management, that “solutions to some contradictions [...] can also be sought through friendly consultation” (Xinhua 1995). Ramos’s strategy for dealing with China has been described as “bi-multilateralism” by Richard Heydarian, in other words “directly engaging with the Chinese leadership while rallying regional support to rein in Beijing’s maritime ambitions in the South China Sea” (Heydarian 2017: 59).

### 2.3 TURNING TO ECONOMIC OPPORTUNITIES UNDER ARROYO

Crisis continued on a lesser level with ups and downs to the end of the Ramos Presidency and into the presidency of Joseph Estrada (1998–2001). It was under Gloria Macapagal-Arroyo that bilateral relations improved markedly from 2001 onwards. Unlike her predecessors, who visited China only once during their tenures<sup>4</sup>, Arroyo was a frequent visitor to China, and managed to initiate a bilateral agreement on joint exploration between the Chinese and Philippine national oil corporations in 2004, to which Vietnam acceded only one year later.<sup>5</sup> This honeymoon was accompanied by a number of huge infrastructure projects that were to be supported by Chinese loans and skyrocketing bilateral trade that for the first time showed a consistent export surplus for the Philippines. Both sides seemed to be on the way to establishing a stable relationship, in which the conflict dimension was embedded in an overarching framework dominated by *mutually enticing opportunities*.

This came to an end when the Arroyo government came under severe attack for corruption and selling out the country to China. Fighting for its political survival, the Arroyo government changed course and allowed the joint exploration agreement to expire after the initial three-year period. China was back as a threat to Philippine security, even if still in a subdued way. The short-lived notion of shelving the conflict slowly vanished. Slowly the South China Sea imbroglio regained its central role with respect to the definition of the bilateral relationship. When China announced that it would send a patrol ship to the South China Sea in 2009, Philippine National Security Adviser Norberto Gonzales claimed that this “should remind us that [...] there will always be nations that will show might and threaten perceived weak nations like us” (Inquirer.net 2009).

4 President Marcos (1965–1986) visited China in 1975, Corazon Aquino (1986–1992) in 1988, Fidel Ramos (1992–1998) in 1993, Joseph Estrada (1998–2001) in 2000. Gloria Macapagal-Arroyo (2001–2010) visited China in 2001 (twice), 2004, 2006, 2007 (three times), 2008 (twice) and in 2010. Her successor Benigno Aquino once in 2011 (Official Gazette, no year).

5 For the text of the Tripartite Agreement signed by the three oil corporations in 2005 see: <http://bit.ly/2GxjGpr>. For the earlier bilateral Agreement of 2004 see: <http://bit.ly/1hHpGLf>.

Driven by domestic concerns, the Arroyo government also abandoned its conscious effort at equi-balancing the United States and China and turned back to the traditional foreign policy line of what Philippine political scientist Renato De Castro unflatteringly describes as a “protectorate status” to the United States (De Castro 2010: 708).

To sum up, while bilateral relations were rather cool until the early 1990s, this was not because of enmity deriving from the Spratly dispute. It was simply that neither side took any interest in giving priority to deepened relations. Relations deteriorated under Ramos. With the 1995 Mischief incident the bilateral conflict took center stage in Sino-Philippine relations. Despite this, bilateral communication was maintained as was the paradigm of bilateral conflict management. Under Arroyo, the Philippines actively supported the Chinese paradigm of shelving the conflict and focusing on economic cooperation and joint development. While there is no indication that this strategy could have led to successful conflict resolution or settlement,<sup>6</sup> the opponents demonstrated during these few years that a lessening of conflict dynamics was possible. Embedded in an overarching cooperative framework, activities such as for example the installation of new navigational lights in 2006 by the Chinese People’s Liberation Army (PLA) on one of the Spratly reefs occupied by China (Zhang 2006) were largely ignored as minor irritants and did not cause the alarm they did during the 1990s.

### **3. ESCALATING TO A MUTUALLY HURTING STALEMATE UNDER BENIGNO AQUINO**

While the onset of the intensification of the bilateral conflict is generally dated from the 2012 Scarborough Shoal Incident (see below), it is important to note that this was preceded by a number of smaller unilateral moves on both sides that worsened relations in 2010 and 2011.

#### **3.1 ESCALATION ON THE GROUND**

While initially not advocating a more confrontative stance towards China, the new Philippine President Aquino nevertheless “was considerably more reticent in pursuing strong economic relations with China, which was perceived to have exploited the corrupt tendencies of the Arroyo administration to forward its own interests in the South China Sea” (Heydarian 2017: 63). Several controversial projects with Chinese participation, most prominently the North Rail project<sup>7</sup> and the Chinese share in the Philippine National Grid Corporation continued to sour relations. Policy also shifted with respect

6 Conflict management is the preferred strategy for dealing with hardened deep-rooted and resolution-resistant conflicts. Its aim is to manage the conflicts in ways that “make it more constructive and less destructive.” It may alternatively be argued that management aims at establishing sustainable mechanisms that reduce the salience of a given conflict. Settlement and resolution both aim at bringing a conflict to an end. Whereas settlement focuses on “working out a mutually satisfactory agreement between the parties involved [...] without necessarily dealing with its fundamental causes,” resolution “means [...] to meet all sides’ basic needs, while simultaneously finding a way to respect their underlying values and identities” (Spangler 2003). In actual practice, the terms settlement and resolution are often used interchangeably for a process that leads to a situation where the conflict no longer exists.

7 This project aimed at providing a railway link connecting Metro Manila to the provinces in northern Luzon.

to the South China Sea. Distancing itself from its predecessor the Aquino government renamed Reed Bank, in the northeastern part of the Kalayaan islands, Recto Bank in honor of a "late senator and eminent Filipino nationalist Claro M. Recto" in 2011 (Bordago/Gonzales 2011). Shortly afterwards Philippine lawmakers and an army general visited Philippine occupied Pag-Asa island in the Spratlys. There they proposed renaming the whole region the *West Philippine Sea*. Chinese criticism that the trip "goes against the declaration of the parties in the South China Sea" were ignored (Orendain 2011).

Already in 2010 the Arroyo government had awarded new licenses for exploration in disputed waters around Reed/Recto Bank. Under the Aquino government exploration commenced in early 2011, despite serious Chinese protests. China reacted by sending patrol vessels that forced the exploration ship to withdraw. The Philippines in turn sent patrol aircraft and escort vessels to accompany the exploration ship. China eventually backed down and did not force a showdown.<sup>8</sup> A few days earlier, it was reported that a Chinese warship had fired at Filipino fishing vessels and in October a Philippine Navy vessel rammed a Chinese fishing boat (Laude 2011). Under Aquino, the Philippine China policy had clearly changed. While it boycotted the ceremony awarding the Nobel Peace Prize to the Chinese dissident Liu Xiaobo and thereby seemed to appease China,<sup>9</sup> it simultaneously turned to a policy of opposing every Chinese move in the South China Sea by acts of counter assertion. The new line with respect to the South China Sea claims was summed up in President Aquino's 2011 State of the Nation Address, where he contended:

"Speaking of security, does enhanced security not also enhance our national pride? [...] Now, our message to the world is clear: What is ours is ours; setting foot on Recto Bank is no different from setting foot on Recto Avenue" [in the national capital of Manila; P.K.] (Aquino 2011).

In early 2012 the Philippines issued new invitations for investments in oil and gas fields in disputed territories.<sup>10</sup> Shortly afterwards, Chinese Maritime Security vessels confronted a Philippine Navy vessel that had tried to apprehend Chinese fishermen in the Scarborough Shoal area. The situation escalated as the two contending forces opposed each other for several weeks. Even though both sides initially withdrew their vessels from the area, the Chinese returned, and have since then blocked Philippine fishermen's entrance to the shoal.

Up to this point in time, both sides had largely played according to the established informal rules of the game applied in similar actions in the past – from the unilateral granting of exploration contracts and exploration in disputed territories to the ramming of ships or the capture of foreign fisher-

8 On the pre-history of the Reed Bank in the formation of the Sino-Philippine conflict see: Muscolini 2013.

9 In this respect reality is more complex, as Aquino himself argued that the decision to boycott the Nobel Prize Award Ceremony was due to Philippine efforts to prevent the execution of several Philippine nationals who had been convicted of drug trafficking and make good on a botched police operation in Manila in the course of which eight Chinese tourists died (ABS-CBN News 2010).

10 Taiwan had already protested in advance against Philippine oil and gas exploration (Bordadora/Gonzales 2011).



men on account of illegal fishing (i.e., the application of national law on disputed territories). Up to this point, all parties to the conflict had concurred that the conflict should be managed by the claimants, with overarching rules for conflict behavior negotiated at the regional Association of Southeast Asian Nations (ASEAN). However, in the wake of the Scarborough shoal incident, Philippine “China hawks,” led by Foreign Secretary Albert Del Rosario “advocated for a full-blown diplomatic offensive against China. At the heart of this strategy was legal warfare (lawfare)” (Heydarian 2017: 66). This term *lawfare* denotes “the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.” (Dunlap 2008: 146)

### 3.2 TURNING TO LAWFARE AS A MEANS FOR OBTAINING VICTORY

In early 2013 the Philippines took the unprecedented step of bringing a case before the Permanent Court of Arbitration against China. Knowing full well that sovereignty conflicts are exempted from compulsory arbitration according to United Nations Convention on the Law of the Sea (UNCLOS), the Philippines framed its case as one that was mostly about the legal significance of specific justifications of Chinese claims (nine-dash line and historic claims) and questions of legal interpretation of core terms of UNCLOS, such as the terms *island* and *rock*. From the outset it was clear that the first case aimed at showing that the unclear Chinese claims within the nine-dash line were invalid. The second case aimed at minimizing the number of *legal* islands in order to minimize the reach of any Chinese territorial claim within the Philippine claimed EEZ. Years earlier China had tried to avoid such a development, when it declared under article 298 of UNCLOS (as had many other states) that it does “not accept any of the obligatory procedures provided for in [...] the Convention with respect to all categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention” (People’s Republic of China 2006). China assumed that none of the Philippine claims “can be addressed without considering matters which are or have been validly removed from the jurisdiction of the Tribunal” (Talmon 2014). However, the Tribunal declared its jurisdiction to rule on the merits of the dispute. From the Chinese position it thereby violated one core foundation of international adjudication: voluntarism and consensualism. While there is no legal definition of arbitration, there nevertheless is a broad consensus on its core determinants, all of which include that any arbitration rests on the prior mandate conferred on the arbitrators by the parties to the dispute. This may be framed as a form of dispute settlement based on the “common will of the parties,” the “parties’ will, expressed in an agreement” or “exercised by individuals, appointed directly or indirectly by the parties, and vested with the power to adjudicate the dispute in the place of [...] courts by rendering a decision having effects analogous to those of a judgement” (Poudret/Besson 2007: 2–3).

Such consensualism is also present in the definition of inter-state arbitration as “the settlement of differences between States by judges of their own choice and on the basis of respect of law” (1899 Hague Convention for the Pacific Settlement of Disputes cited in: Malintoppi 2006: 134). Both the unilateral decision of the Philippines and the eventual acceptance of the case by the PCA cannot be

easily reconciled with this principle of consensualism that sets arbitration apart from adjudication.<sup>11</sup> One might further argue that the Philippines exercised its right to put its case to arbitration in “bad faith,” insofar as it exercised its right “for an end which it was not intended for (improper purposes)” (Reinhold 2013: 49). In this case, the case brought before the PCA ostensibly was *only* about the interpretation of UNCLOS. The intended and realized effect, however, was a legal delegitimation of Chinese territorial claims.

In its quest to win the case, the Philippines also disregarded well established knowledge about the (factual) preconditions for successful arbitration:

“The use of arbitration to solve territorial disputes can be successful only where the parties are committed to resolving the dispute peacefully through arbitration, and that such a commitment is unlikely if the dispute involves an issue considered to be of vital national importance. For arbitration to successfully resolve such disputes, the parties must have a modicum of trust in each other and be willing to accept the fact that they may lose. Thus, an arbitration agreement imposed upon the parties [...] will not work.” (Copeland 1999)<sup>12</sup>

By utilizing the PCA against the expressed will of China and by pretending that it was a case about legal interpretation while aiming at a decision that delegitimated China’s territorial and maritime claims, the Philippines utilized the arbitration panel as if it were a court, and successfully used this pretense to defeat China indirectly.

Equally dramatic for China was that the Philippines were highly successful in spreading and asserting their narrative of the conflict in the international media, international public opinion and in the perception of the political leadership of the Western and a number of Asian countries. Philippine Foreign Minister Del Rosario portrayed the Philippines as simply aiming at “implementing a rules-based approach” and at a global system “that will be just and fair to all states, regardless of economic size or power” (Del Rosario 2012). Del Rosario quickly established a very successful overarching narrative according to which the Philippines are a true believer in international law and that international law and its organs “serve as the great equalizer among States, allowing countries, such as my own, to stand on an equal footing with wealthier, more powerful States” (Del Rosario 2015a). The conflict was framed as one between might (China) and right (Philippines), the ruling stylized as a momentous precedent with global impact:

11 Here the core problem seems to be that China is perceived as having opted out of compulsory arbitration through its 2006 decision, whereas the arbitration tribunal was of the opinion that the questions put forward by the Philippines related to aspects for which China had given its consent with its ratification of UNCLOS. Therefore, from the arbitration tribunal’s perspective, there was no need for a special arbitration agreement, as Chinese consent was already “contained in a specific dispute settlement of a general treaty [in this case UNCLOS; P.K.]” (Malintoppi 2006: 136).

12 See also the analysis of Gent and Shannon (2014) who examined state compliance with arbitral and adjudicated rulings on territorial claims and concluded that “states are less likely to comply when the stronger disputant is asked to make greater concessions” (p. 303).

“There are some who could not believe that the Arbitral Tribunal would have the courage to apply the law to a country like China. There are those who think the rule of law in international relations does not apply to Great Powers. We reject that view. [...] Those who think “might makes right” have it backwards. It is exactly the opposite, in that right makes might. That is why, in January 2013, we confidently put our fate in the hands of this Tribunal and the compulsory dispute resolution mechanisms of UNCLOS.” (Del Rosario 2015b)

Only seldom noted is that by turning to international compulsory arbitration the Philippines not only switched arenas, but even more importantly, it shifted from the past practice of perennial conflict management to conflict settlement. Whereas the constant bickering, the policies of pinpricks or the various other tit-for-tat strategies that had characterized previous decades never aimed at producing a final outcome, compulsory international arbitration differs, at least with respect to its aspiration, by pronouncing a binding final settlement.

Such a binding ruling may be ignored by a strong power, however, only at substantial costs. Compulsory arbitration transforms a temporally undetermined conflict into one with a defined end. Whereas beforehand gains and losses have a preliminary character, binding arbitration has an inevitable conclusion: the ruling that separates winners from losers. It transforms the conflict into a game, where not only the outcome is beyond the control of the parties to the conflict, but also the timing of the decision.

### 3.3 CHINA HITTING BACK

In view of their refusal to participate in the arbitration process and the successful efforts of the Aquino administration to muster significant international support for its position on resolving the conflict through arbitration, China turned to escalation in the arena in which it was clearly superior: action on the ground in the South China Sea. Knowing full well that time was running out, from 2014 onwards China acted decisively by transforming small elevations in the sea, occupied by Chinese forces and equipped with fairly small military installations, into vast artificial islands complete with huge harbors, airports and substantial military defense equipment. As the Philippines did not budge and retract their case at the PCA, local incidents between Philippine and Chinese actors in the South China Sea multiplied. Whereas the years 2012 and 2013 saw only one incident in which Chinese law enforcement forces were implicated, the number rose to two in 2014, three in 2015 and six in the first six months of 2016 prior to the PCA ruling (CSIS 2017).

Whether China also resorted to economic pressure is contentious. It is argued here that there is insufficient evidence for such a Chinese policy. The only dimension pointing in this direction is the lackluster development of Philippine exports to China after 2014 (see figure below). However, this downturn closely resembles the one to Japan. Similarly, exports to other important trading partners also stagnated. Attributing the downturn in Philippine exports to China to Chinese reprisals is thus speculative at the least.

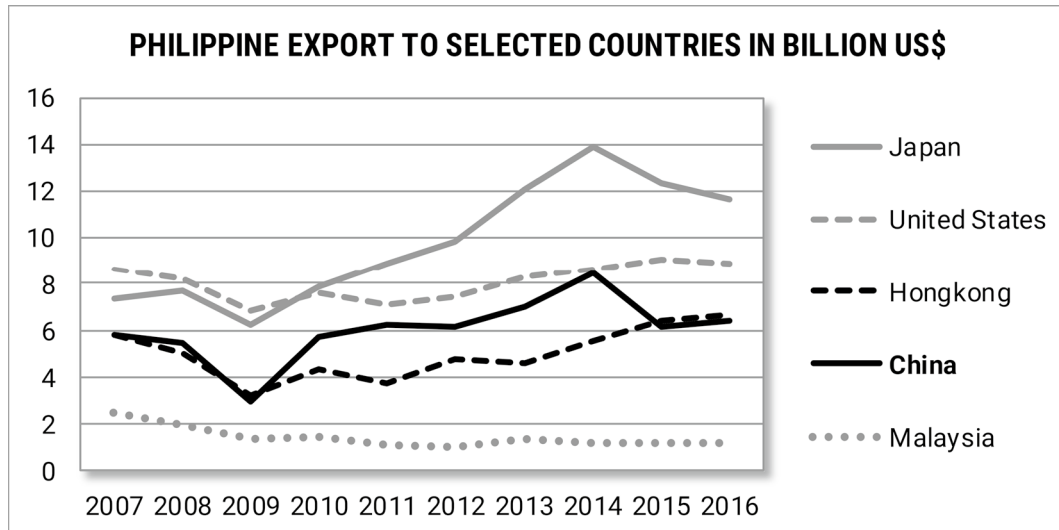


Fig. 2: Philippine Export to Selected Countries in Billion US\$ (Sources: Philippine Statistics Authority, various datasets)

The assumption of Chinese reprisals is also disputable because of the continued rise of Chinese tourist arrivals in the Philippines. From 2011 to 2015 the overall number grew by 102 percent. Whereas Chinese tourists accounted for approx. six percent of all tourists in 2011, their share had risen to more than 9 percent by 2015.

Despite these numbers, which scarcely substantiate that there was an explicit Chinese policy of economic coercion, fears abounded in the Philippines, as in the example of Cabinet Secretary Almen-dras, who disclosed that the government was prepared in case the Chinese minority owner of the National Grid Corporation of the Philippines tried to sabotage the country's power supply (Gonzales 2014). Others, such as former Ambassador Roberto Romulo, argued that bilateral trade had slowed and "huge planned investments were either lost or 'forgotten' due to the sanctions China has imposed on the Philippines" (The Manila Times 2014). The thesis was also taken up in scientific circles (Glaser 2012, Dundon 2014, Yung/McNulty 2015; Feaver/Lorber 2015, Lai 2017) and also resonated widely in the Philippine media (Sonmez 2014).

Most threatening from the Philippine perspective was that China clearly bypassed the Philippines in its One Belt One Road Initiative (OBOR).<sup>13</sup> While China did not explicitly exclude the Philippines, the various Chinese maps produced before the PCA ruling clearly bypassed the Philippines.<sup>14</sup>

13 The One Belt One Road initiative is a comprehensive development strategy aimed at enhancing international trade through huge infrastructure investments that link China to Europe. It covers more than 60 countries, equivalent to more than 60 percent of world population and 40 percent of global GDP (see map).

14 For several (semi-)official maps published before the PCA ruling see: China Daily 2014, Xinhuanet 2016b; The State Council PRC 2015. For a discussion of this topic see: Chan Irene 2015. The Wall Street Journal 2014.

While China assured the Philippines that it did not intend to bypass the country (GMA-News Online 2014), it became clear that meaningful negotiations on the Philippine place in the vast endeavor remained stalled for the time being, whereas at the same time concrete projects were hammered out with a large number of other countries.

### **3.4 THE OUTCOME FOR CHINA: A PAINFUL IMPASSE DESPITE VICTORY ON THE GROUND**

When in the summer of 2016 the PCA finally delivered its judgement, both sides of the conflict found themselves in a very uncomfortable situation. To China the immediate negative repercussions with respect to bilateral relations were negligible. With the establishment of artificial islands it had clearly strengthened its position on the ground to an unprecedented extent. With harbors and airports on the artificial islands, China “substantially expanded its ability to monitor and project power throughout the South China Sea” (Asia Maritime Transparency Initiative, no year).

However, wider repercussions grew as more and more Southeast Asian countries grew wary of Chinese intentions in the region and questioned the Chinese narrative of a peaceful rise of China. Not only relations with other claimant countries deteriorated, but non-claimants also voiced their opposition to China, such as Singapore, whose Prime Minister Lee Hsien Loong criticized that “outcomes cannot be determined just by might is right, I think international law must have a big weight in how disputes are resolved” (Lee 2014). In May 2016 Singapore’s ambassador at large, Bilahari Kausikan, argued in an opinion piece for the Singaporean Straits Times that Xi Jinping’s idea of a “great rejuvenation” of the Chinese people was slowly turning out to be “externally [...] increasingly an essentially revanchist narrative” (Kausikan 2016c; see also Kausikan 2016b). A few months earlier he had already delivered an extraordinarily forceful speech that provided a detailed analysis of how and why China had alienated almost all regional powers that were not overly dependent on it for economic reasons (Kausikan 2016a).

China had not only lost the normative contest for the hearts of Southeast Asian leaders, it had also isolated itself with respect to the First World. The escalation on the ground driven by China gave the United States an ideal opportunity to strengthen its bonds not only with the Philippines, but also with other Southeast Asian countries, most importantly with Vietnam, and to gain additional legitimacy for its policy of countering Chinese claims with its Freedom of Navigation operations. Furthermore, other external countries started to play a role in regional security – most prominently Japan and Australia, both of which deepened their security relationships with the Philippines. In 2012 the Philippine senate ratified a Visiting Forces Agreement that had been put on hold since it was signed by the Philippine government in 2007. In the same year defense cooperation with Japan was established and further deepened in the following years.<sup>15</sup> Japan even extended its Official Development Assistance (ODA)

15 See for example the 2015 Memorandum on Defense Cooperation and Exchanges between the Ministry of Defense of Japan and the Department of National Defense of the Republic of the Philippines. (<http://bit.ly/2cppTth>). Less than one year later a further agreement followed that allows Japan to supply military equipment to the Philippines (Philippines Department of National Defense 2016. <http://bit.ly/2E4nRL1>).

regulations to allow multi-role response vessels to be supplied to the Philippine Coast Guard (Japan International Cooperation Agency 2017; Rahmat 2017; The Philippine Star 2016b).

Even European states signaled their enhanced interest in a rule-based order for South East Asia, with the French Minister of Defense, Le Drian, even proposing that European navies could take an active part in the conflict by ensuring “a presence that is as regular and visible as possible in the maritime areas in Asia” (Le Drian 2016). Almost simultaneously the G7 foreign ministers’ meeting in Hiroshima decided on an unprecedentedly sharp statement that without explicitly mentioning China, nevertheless targeted its “intimidating, coercive or provocative unilateral actions” (G7 2016).

Clearly, prospective costs to China were rising dramatically. On the basis of a positive PCA ruling, the Philippines could press its case in the international community, rallying “multilateral diplomatic pressure on China,” for example by turning to the United Nations General Assembly, by establishing “additional and supplementary arbitration cases against any Chinese actions” (Heydarian 2017: 71) which other regional claimants could join, or by encouraging other external powers to conduct Freedom of Navigation Operations. Such a development would have forced Sino-Philippine relations into a dangerous circle of escalation that would have been hard to control.

### **3.5 THE OUTCOME FOR THE PHILIPPINES: FROM VICTORY TO A SEVERELY PAINFUL DEAD-END**

From the perspective of the Aquino administration, its strategy had been a complete success, as the Philippines had scored a total victory in its arbitration case. In the wake of the 2016 ruling, the former Philippine President Aquino lauded the PCA for its “fair judgement” and declared the ruling a “victory for all” and the dispute “closer to having a permanent solution” (Rappler 2016b). Former Foreign Minister Del Rosario followed a similar line, lauding the “wisdom and objectivity” of the PCA and expressly thanking the “community of responsible nations” that supported the Philippines. He further added that the ruling affirmed “our collective belief that right is might and that international law is the great equalizer among states” (Philippine Star 2016a). On the occasion of the first anniversary of the ruling, he stated in mid-2017:

“We should be proud of our country’s leadership on this issue. [...] We must protest what is unlawful, coercive, and contrary to the correct principles that govern relations between states. We should seek cooperation from like-minded states. We should be ready to approach the UN General Assembly to appeal to the global village of nations.” (Del Rosario 2017)

Clearly, if the Aquino government had stayed in power, the situation would not have been perceived as a dead end, nor would the development of bilateral relations and the Chinese foray in the South China Sea during the past few years have been interpreted as extremely painful.

Yet, to a growing number of Filipinos, the costs seemed to have been rising, with success being limited to spheres that did not belong to core Philippine interests. While clearly winning the diplomatic contest and successfully resorting to external balancing, the strategy had not prevented China from vastly extending its presence and clout in the areas claimed by the Philippines. In addition, continuing the course at that juncture threatened the Philippines with huge economic costs. The previous years showed how the country had seemingly been left out of the Chinese Belt and Road vision and plans. It was clear that China, one of the most important external trade partners of the Philippines, could resort to economic coercion. This might easily throttle the Philippine economy. Neither exports to the United States nor to Japan could easily balance prospective losses in the case of Chinese sanctions. Finally, the United States consistently shied away from committing itself to the defense of the non-Metropolitan areas of the Philippines. Thus, in the final analysis there was a clear danger that the Philippines would have to confront China on its own, if the latter chose to further escalate the conflict on the ground.

This critical line was strongly advocated by the incoming President Duterte. Duterte set out from a mindset that criticized the Aquino administration's strategy as counter-productive. While it had succeeded in gaining important international political support, this could not be translated into a policy that prevented Chinese assertiveness on the ground. It was actually perceived as causing the unprecedented level of assertive moves by the Chinese which had resulted in a severe deterioration of the strategic position of the Philippines. Foreign Secretary Yasay for example argued that

“the provoking and inflexible tack taken by the previous administration in resolving the dispute have led to the completion by China of facilities that are inherently designed for military purposes in some of the rock features within our EEZ, while we stand completely helpless with our ally and traditional partners.” (Yasay 2016a)

To the new administration the Philippines had clearly lost out with respect to their own immediate interests precisely because of the confrontational stance that framed the conflict as one pitting good against evil, or David against Goliath, and linked it to the Sino-US contest for regional and global hegemony. To Yasay, Philippine “military reliance and dependence on America” “promoted [Chinese; P.K.] distrust and suspicion [...] In turn this has impelled China to dig in and take on a hard-line position on its territorial claims” (Yasay 2016b).

#### **4. DUTERTE SEIZING THE RIGHT MOMENT**

Already in the early phase of campaigning presidential candidate Rodrigo Duterte made it clear that as elected president he would change the Philippine strategy for dealing with China in the conflict on the SCS. While he emphasized that he would never surrender Philippine sovereignty and sovereign rights in the South China Sea, he argued that the Aquino government's strategy was not viable, as it could not deliver on the enforcement of a positive PCA ruling, while “exacerbating tensions and heightening the risk of war or the use of force” (Yasay 2016a). Setting out from a worst-case scenar-

io – an armed conflict with China – the Duterte administration turned to appeasement by accepting core procedural norms advanced by China for dealing with the conflict – shelving the sovereignty issue, managing the conflict in bilateral forums and focusing on other issues that allow for bilateral engagement. These range from joint exploration and cooperation in the sphere of non-traditional security issues in the South China Sea to the strengthening of bilateral trade and Chinese support for Philippine development. In early February 2016 Duterte had already made clear that

“we cannot defeat you (China). We will be pulverized if we go to war. So I will just tell them, ‘If you want to talk, let’s talk. Or you might just want to open this as a mutual corridor and I will be willing to talk to you if there is oil and gas. Let us do it joint exploration.” (Duterte quoted in Rappler 2016a).

His running mate, the current Foreign Minister Cayetano, supported the view that the new government would not compromise on the Philippine claims but would emphasize toning down the differences and refocusing discussions on joint endeavors that do not force any side to give up on sovereignty (Inquirer.net 2016).

#### 4.1 GETTING COMMUNICATION BACK ON TRACK

China already reacted to Duterte long before his election in May 2016 and in the early days of his presidency. High ranking Chinese diplomatic personnel met Duterte several times. Duterte’s running mate Alan Peter Cayetano visited China in an unofficial mission shortly after the elections in June 2016 (ABS-CBN News, 2016; Presidential Communications Operations office 2016). Even before Duterte assumed office China was also reported to have taken up the President-elect olive branch and “stopped harassing Filipino fishermen in Scarborough” (GMA-News Online 2016). Its media also changed their course in reporting on the Philippines. The notoriously hard-hitting Global Times even provided a blueprint for a shift towards a reset of the bilateral relations along a more cooperative line in the wake of the arbitration award. Foretelling later developments, on June 14, two weeks before Duterte’s inauguration, the Global Times wrote:

“The result of the international arbitration filed by the Aquino administration is very likely to favor the Philippines, giving Duterte leverage in bargaining with China. Manila and Beijing might reach a reconciliation: The Philippines will be asked to employ a low-key approach to the result of the arbitration and turn to bilateral negotiation with China; in exchange, China will incorporate the Philippines into its “Belt and Road” initiative, expand investment in the Philippines and seek larger cooperation in infrastructure.” (Global Times, 14 June 2016)<sup>16</sup>

<sup>16</sup> For earlier comments see: Xinhuanet 2016a; Global Times 18 May 2016; Global Times 18 May 2016a, 18 May 2016b; Global Times 10 May 2016a, 10 May 2016b.



Given those signals, it came as no surprise that both sides revived bilateral communication as soon as Duterte took office.

What officially began with the prominent visit of former President Fidel Ramos to Hong Kong in early August 2016 quickly gathered pace. In September 2016 a delegation comprising various members of the Philippine Council on Foreign Relations and the Philippine Ambassadors Foundation, both of which are broadly in favor of the new policy line under Duterte, visited China and re-established track-two diplomacy (Bautista 2017; Philippine Ambassadors Foundation Incorporated (PAFI) 2017). In early October President Duterte appointed Jose Santa Romana, a long-time resident journalist in Beijing and President of the Philippine Association of Chinese Studies (PACS), new Philippine ambassador to China. Santa Romana had already argued in 2012 against the Aquino line of dispute management with China (Romana 2012).

Santa Romana's appointment was followed by the most outstanding highlight of the new era of bilateral relations: the four-day visit of Philippine President Duterte to China in October 2016, which had been successfully arranged on short notice and during which Duterte talked to both President Xi Jinping and Premier Li Keqiang among others. He brought home from his visit Chinese contract and loan promises worth \$US24 billion, with China indicating its willingness to support a number of the core infrastructure projects of the Philippine President's *Build Build Build* program (Philippine Infrastructure Transparency Portal, no year). Since then, Philippine President Duterte has visited China and met Xi several times, with top Chinese politicians reciprocating, most prominently Chinese Premier Li Keqiang in November 2017.

#### **4.2 SHIFTING COURSE IN THE SOUTH CHINA SEA AND IN BILATERAL SECURITY RELATIONS**

Yet, these top-level meetings were only the tip of the iceberg of a dramatically improving and swiftly multiplying plethora of Philippine delegations visiting China and corresponding visits of Chinese delegations to the Philippines. Long dormant bilateral conduits were revitalized as the Joint Commission on Economic and Trade Cooperation, while others were newly established as the China-Philippines Bilateral Consultation Mechanism on the South China Sea and the Joint Coast Guard Committee (JCGC) (Philippine Coast Guard 2017). A mere three months after the establishment of the institution at the beginning of 2017 the newly-invented lines of communication and cooperation led to the participation of 20 officers of the Philippine Coast Guard in a training course at the China Maritime Police Academy in Ningbo. In November 2017 the two sides further established a hotline communication mechanism, with China offering to donate the necessary equipment (Marcelo 2017). A further sign of change was the visit of three Chinese warships to the home city of President Duterte, Davao, in early May 2017, seven years after the last such visit of Chinese People's Liberation Army Navy (PLAN) forces in April 2010 in the last days of the Arroyo Presidency (SINA 2010).

While China continues with the military development of the various reefs and atolls it has transformed into artificial islands during the past years (see: Asia Maritime Transparency Initiative 2017),

it has shied away from strengthening its grip on Scarborough Shoal. The militarization of the newly established artificial islands can be interpreted as proof of Chinese assertiveness and continued aggressive action. It is, however, framed differently by the current Philippine government. To the Duterte government, the core issue is not the continued development of the artificial islands established in recent years, but whether China stops with the elevations it occupied earlier or establishes a presence on others. As Presidential spokesman Harry Roque formulates the new line:

“As long as there is [no] reclamation of new islets or reefs, then we continue to respect that they are true to their commitment. [...] But I think from the very beginning, China, we knew was militarizing the area by reclaiming these areas and by using them as military bases [...]. The point is, has there been a breach of Chinese commitment not to reclaiming any new islands or shoals in the area? None.” (Manila Standard, January 10, 2018, p. A2)

In line with these shifts in the diplomatic sphere and Philippine official narratives on Chinese *assertiveness*, Chinese conflict behavior on the ground changed. Whereas the number of Sino-Philippine incidents involving law enforcement units rose dramatically in the first half of 2016 the second half of that year saw zero incidents and in 2017 only one incident was recorded.

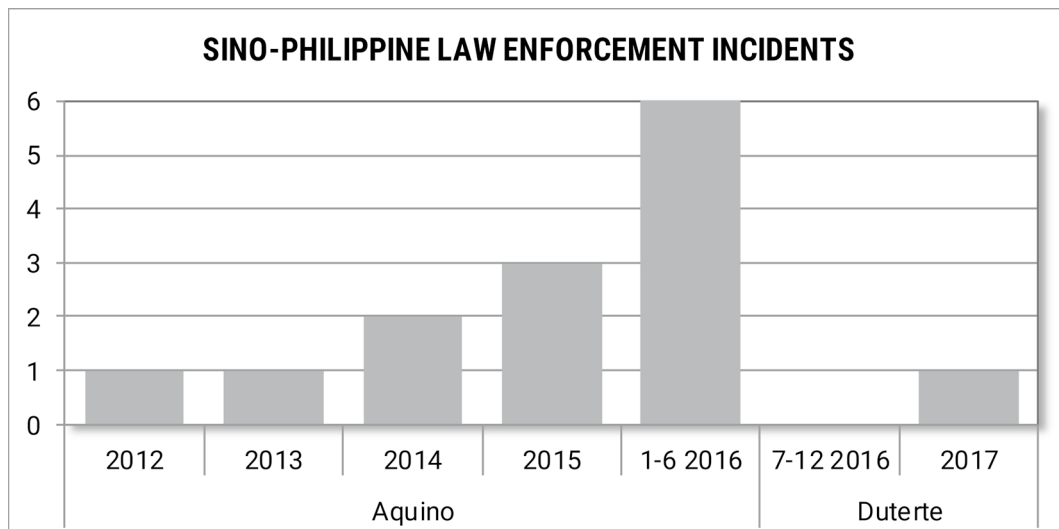


Fig. 3: Sino-Philippine Law enforcement incidents (Source: CSIS, no year).

China also proved supportive of Philippine interests with respect to the long-delayed Code of Conduct for the South China Sea (COC). Whereas in past years China had blocked any steps in this direc-

tion, it was now willing to sign at least a “framework” agreement for a future COC during the ASEAN foreign ministers’ meeting in Manila in August 2017.<sup>17</sup>

Even more astounding are the developments with respect to joint exploration. While there is still a long way to go to arrive at a feasible option, the two governments have been in continuous discussion on this subject. Three developments need to be noted that may help to establish a new discourse on joint exploration and development without for the time being directly confronting the legal problems associated with exploration in disputed territories. First, an old Sino-Philippine Joint venture<sup>18</sup> for exploration off the coast of Palawan (Service Contract 57) has been revived. This was awarded in 2007, but has been dormant since then and was only re-activated in September 2017, with the signature of the President still pending. Second, there has been a bid by the China National Offshore Oil Corporation for a USD\$2 billion contract for the establishment of the Philippines’ first integrated liquefied natural gas facility (Manila Standard 2018). Third, in January 2018 the Philippine Department of Foreign Affairs cleared the way for joint marine scientific research between the Chinese Institute of Oceanology of the Chinese Academy of Sciences and the Marine Science Institute of the University of the Philippines in waters east of the Philippines (Benham Rise and East of Mindanao) (Pazzibugan 2018). China in turn has tried to calm the waters by explicitly framing the research as being undertaken “in water under Philippine jurisdiction” and has also aimed at creating a “good atmosphere for the development of bilateral ties” (Xinhuanet 2018). The nationalistic Global Times even stated that “Philippine President Rodrigo Duterte allowed China to research [...] at the Benham Rise” (Lulu 2018). Simultaneously, Philippine Secretary of Foreign Affairs Cayetano disclosed that the two countries would discuss how to implement joint exploration in disputed territories without compromising territorial claims. The aim of the discussion is an agreement that “conforms to both Philippine law and Chinese law” (Pazzibugan 2018a).

### 4.3 REVITALIZING ECONOMIC RELATIONS

Finally, as was already mentioned above, the Philippines were able to profit economically from the betterment of bilateral relations. Philippine exports that had seen some decline during the last year of the Aquino Presidency rose again under Duterte. Overall exports to China stood at US\$ 5,713 million during the last year of Aquino as compared with US\$ 6,913 million during the first year of Duterte (+21 percent).

17 For a critical view of the framework agreement as mere window dressing see Poling 2017. For a more detailed critical analysis see Storey 2017.

18 The joint venture is between two Philippine corporations, PNOC Exploration Corp. (28%), Jadestone Energy Inc. (21%) and the Chinese National Offshore Oil Corp., which holds 51% of the shares.

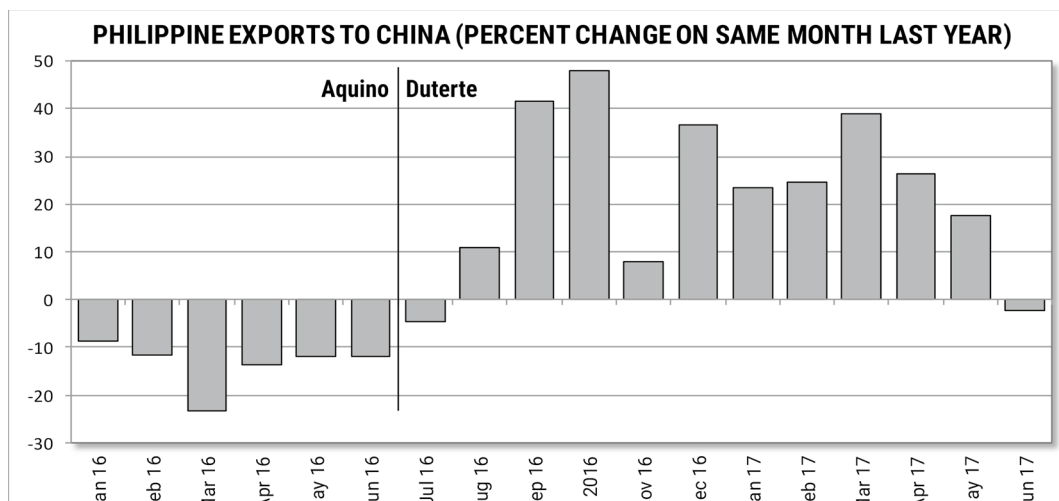


Fig. 4: Philippine Exports to China (percent change on same month last year) (Source: Philippine Statistics Authority: Foreign Trade Statistics (Export), various issues, <https://psa.gov.ph/business/foreign-trade>)

Compared with the first 10 months of 2016, Chinese tourism also saw a distinct rise by 39 percent for the same period in 2017. Two decisions account for this shift. First, on account of Duterte's visit to China in October 2017, China lifted its travel warning to the Philippines that had been issued in 2014. Second, the Philippines changed their visa policy for the Chinese. Since August of 2017 the Philippines has been granting visas to Chinese tourists upon their arrival. Since July of 2017 the number of Chinese visitors has exceeded those from the US and with approximately 80,000 per month is second only to South Korea. Even more important, Chinese have overtaken Korean tourists during the last few months and have become the top spenders (Philippine Department of Tourism, no year). Tourists from China and South Korea spent more than 9 billion Philippine Peso (PhP) in October, whereas tourists from the United States only came in a distant third, with approximately 2.5 billion PhP (Philippine Department of Tourism 2016).

A similar shift occurred with respect to total approved Chinese Foreign Direct Investment (FDI), which rose by 93 percent from 1,291 to 2,494 million pesos from the last year under Aquino to the first year under Duterte. Yet, given that by far the highest volume of Chinese FDI was approved from late 2013 to late 2014, when the Sino-Philippine confrontation was already in full swing, it seems to be premature to argue that the higher numbers of the first year of Duterte as compared with the last two years of Aquino (see figure below) should be attributed to the new policy line under Duterte. It should also be further mentioned that in contrast to foreign trade and tourism, China is not an important player with respect to foreign direct investment in the Philippines. Japan, Korea, the United States, the Netherlands, Singapore, the Cayman Islands or the British Virgin Islands and a host of other countries clearly outpace China in this respect.

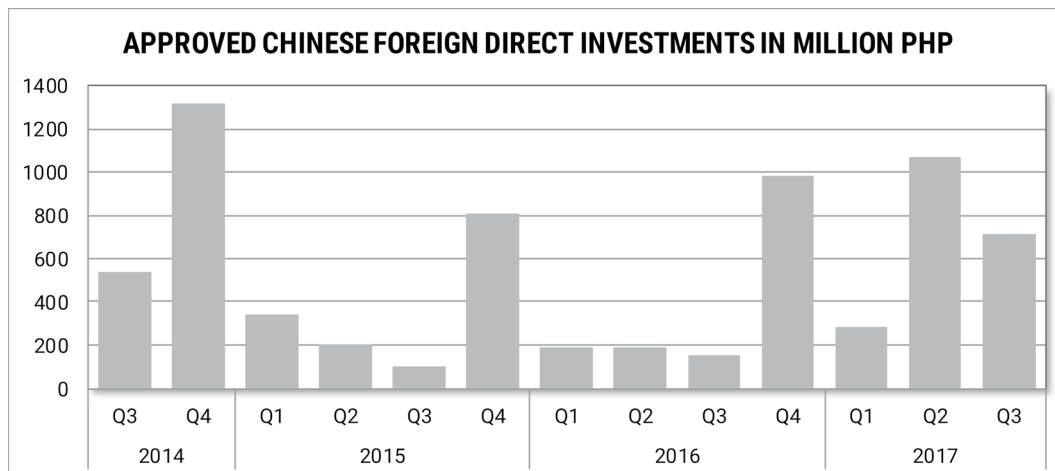


Fig. 5: Approved Chinese Foreign Direct Investments in Million PhP (Source: Philippine Statistics Authority. Various quarterly Foreign Investments reports).

Finally, the above-mentioned Chinese promises of support for Philippine infrastructure investments are slowly gaining traction. The various projects initiated during the visit of Philippine President Duterte to China in October 2016 are being further developed, with a number of them already in the concrete planning stage – from the New Centennial Water Source-Kaliwa Dam Project and the Chico River Pump Irrigation Project to the North-South Railway Project, all the way to the Binondo-Intramuros and Estrella-Pantaleon Bridge projects that link the northern and southern parts of Metro Manila. The China Development Bank and the Philippine Bases Conversion and Development Authority also signed a Memorandum of Understanding to establish a framework for financial cooperation for several projects worth up to US\$ 4.5 billion (Bases Conversion and Development Authority 2018). Chinese finance is also forthcoming for the Philippine National Railways (PNPR) South Long Haul Project that will construct a 581 km railway from Manila to Batangas City, Legaspi City and Matanog. Further, Chinese state-owned enterprises are bidding in a number of public works projects in the Philippines, such as, for example, the new Clark International Airport Terminal Building. To the Philippines these activities clearly signal that China has finally included the Philippines in its Belt and Road Initiative. Finance Secretary Carlos G. Dominguez III commended China for its Belt and Road Initiative that “is the most significant enterprise since the construction of the Great Wall. Unlike the Great Wall, however, this initiative enhances cooperation instead of repelling interaction” (quoted in: Tubayan 2017). World Bank specialists also encourage the Philippines to learn from the Chinese model and its “success in infrastructure delivery” and see the Philippines as being “on an exciting path that gives infrastructure investment the necessary priority” (Warwick 2017).

#### 4.4 DEVELOPMENTS UNDER DUTERTE: FROM THE BILATERAL TO THE REGIONAL LEVEL

Duterte’s gamble to define and seize the opportunity of the PCA award as a turning point in the escalating dispute with China has, at least for the time being, not resulted in a weakening of the Philippine

legal position. At the same time, it eased not only bilateral relations with China but also allowed for a significant de-escalation of the overall conflict dynamics between the ASEAN countries and China.

Whereas the past one and a half years under Duterte saw no breakthrough in the management of the Sino-Philippine territorial conflict, they have brought about a dense network of bilateral contacts that allow better and timely communication of mutual misgivings and their processing prior to them attracting public attention and the accompanying nationalistic reflexes. Under Duterte, the conflict has also been re-embedded in a broader context of cooperation. During the past year, the negative incentive of rising costs has also been partly replaced by newly developed gains that may provide an added impetus for searching for sustainable means for less confrontational management of the seemingly intractable conflict.

Relations between China and other claimants have also improved, although less than those with the Philippines. Sino-Vietnamese law enforcement incidents, for example, also dropped from five in 2014 and 2015 respectively to three in 2016 (two in the second half) and one in 2017 (CSIS 2017). While continuing the militarization of its artificial islands, China took a more cautious tack in its other activities in the South China Sea. It did not protest Vietnamese and Philippine decisions to extend their installations on islands occupied by them. While Chinese relations with Vietnam are not as smooth as those with the Philippines, they nevertheless experienced some détente, with China trying to improve bilateral relations (Nhan Dan Online 2017) – despite the continued strengthening of US-Vietnam ties (Vietnam-US Joint Statement 2017 in: Custom News 2017). Current Sino-Vietnamese détente follows a similar logic to the one between China and the Philippines: downplaying the territorial conflict, simultaneously enhancing bilateral economic ties (Nhand Dan Online 2017b) and in this way creating a more favorable overall framework for cooperation. Yet, when Vietnam decided to unilaterally exploit subsea resources in Block 136-03, approximately 500 km off the Vietnamese coast halfway between Vietnam and (East) Malaysia,<sup>19</sup> China forced Vietnam to abandon this gas-drilling project in July 2017, signaling that it still would not tolerate unilateral decisions for exploitation (Ives 2017).

For the Philippines and the other South East Asian claimants, current opportunities are mainly economic. For China they are more on the “symbolic” level of politics, as China may regain the relatively broad acceptance of its self-image of a peacefully rising power in Southeast Asia that it enjoyed during the first decade of the new millennium in the international media and social sciences alike.<sup>20</sup> In a 2005 article veteran China-specialist David Shambaugh summed up the dominant perception of Chinese foreign policy:

“Beijing’s diplomacy has been remarkably adept and nuanced, earning praise around the region. As a result, most nations in the region now see China as a good neighbor, a constructive partner, a careful listener, and a nonthreatening regional power.” (Shambaugh 2005: 64)

<sup>19</sup> For a map that details the position of Block 136/03 see Bloomberg 2017.

<sup>20</sup> See for example Esther Pan 2006; Xia 2006; Christensen 2006; Sutter 2004; Goldstein 2005; Rosecrance 2006.

Three years later specialists from the Congressional Research Service argued that by

“downplaying many conflicting interests and working collaboratively with countries and regional organizations on such issues as territorial disputes and trade, Beijing has largely allayed Southeast Asian concerns that China poses a military or economic threat.” (Lum/Morrison/Vaughn 2008: summary)

This fairly positive image has been severely damaged mostly due to Chinese assertiveness in its conflicts with other claimants in the South China Sea. In the wake of the developments of the past few years, the pendulum seems to have swung back to a perception of a threatening China that was dominant in the second half of the 1990s.

Philippine policy under Duterte has been an open invitation to return to and extend past practices of embedding conflicts in a broader framework of cooperation as was the case during the first decade of the new millennium. Chinese reactions since mid-2016 signal that China may be capable of learning that in its quest for respect it has to grant equal respect to its counterparts and make wise use of its superior military power.

Currently, regional leaders seem to be content with the new messages emanating from China and they are signaling their willingness to continue along the new line, as seen by, for example, Indonesian Defense Minister Ryamizard Ryacudu, who pointed out during the January 2018 Raisina Dialogue in New Delhi (Ryacudu 2018) that the situation in the South China Sea had improved. He said Indonesia appreciates “the goodwill of China to be more open and their willingness to cooperate and strengthen the security architecture in this region” (Ryacudu 2018). While this is a notable statement in itself,<sup>21</sup> even more important is that this was explicitly recognized and appreciated by the Chinese government spokeswoman Hua Chunying who said:

“The trust between China and ASEAN countries is so precious and the stability in the South China Sea is a hard-won outcome. [...] China stands ready to continue to work with relevant parties to vigorously advance the consultation on the Code of Conduct in the South China Sea (COC) and maritime practical cooperation and commit ourselves to upholding peace, stability, prosperity and development in the South China Sea” (China Ministry of Foreign Affairs 2018).

The ASEAN discourse on the security situation in the South China Sea has been similarly moderate in its tone. When for example, the ASEAN defense ministers reaffirmed “freedom of navigation in and

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21 During the previous two years Indonesian policy towards China had shifted, as Indonesia took a much stronger stance against Chinese arguments that the two countries' claims overlap in the Natuna area. Whereas in the past Indonesia had mostly focused on finding and supporting a diplomatic “solution to the broader disputes,” it slowly shifted to “one primarily focused on protecting its own interests around the Natuna Islands” (Connelly 2016, see also: Cochrane 2017).

over-flight above the South China Sea” and “the exercise of self-restraint in the conduct of activities” and the avoidance of any “actions that may further complicate the situation,” in the annual meeting in October 2017, the Chinese Defense Minister, who attended the meeting concurred that China “will stick to the principles of amity, sincerity, mutual benefit and inclusiveness in the cooperation with our neighbors, and stand for a concept of common, comprehensive, cooperative and sustainable security in Asia” (quoted in Xinhuanet 2017).

## 5. CONCLUSION: REVERTING BACK TO SQUARE ONE?

In principle, efforts at conflict settlement through international legal instruments is a welcome move. However, in conflicts about core interests of the contestants this can easily backfire and contribute to further escalation if this form of conflict settlement is sought by only one party. Turning to compulsory arbitration under UNCLOS and fabricating a case that did not touch upon territorial questions, well knowing that any ruling would have vast consequences exactly in this respect, was a legally shrewd move by the Philippines. However, it clearly went against the dominant regional practice and political prudence, as it was clear that this move would engender heightened resistance and confrontation.

In East Asia only a miniscule number of territorial conflicts (maritime or otherwise) have been brought to arbitration, and only with the consent of all contending states. This is also a general norm in territorial conflicts: such conflicts are rarely brought to arbitration and only when both parties have concurred in advance (Gent/Shannon 2014). Western criticism of China’s intransigence ring hollow, given that Europe and the United States generally do not invoke international institutions in the settlement of their border conflicts. While most of the European Border conflicts have been settled (21 of 30), only 2 were settled through arbitration (Fravel 2014: 27).

While the Chinese non-recognition of the proceedings and the ensuing ruling may be deplorable, Chinese intransigence follows that of other big powers that chose to push their national interests when these collided with international law. As Gent and Shannon show, even when stronger states have agreed to compliance in the arbitration or adjudication of territorial claims, actual compliance was only somewhat more than 50 percent in all those cases where the award required the stronger party to make significant concessions (Gent/Shannon 2014: 312). Put simply, in practice arbitration and adjudication have failed to resolve conflicts, especially when the outcome deviated significantly from the power balance. If this is so in those cases where the opponents had agreed on giving “up decision control to a third party who determines the specific terms of the settlement” (Gent/Shannon 2014: 314), it should be all the more prevalent in those cases where the proceedings have been imposed on one party, especially if this is the stronger one.

Currently the *old* agenda is back in the South China Sea with its focus on confidence-building measures, symbolic politics and economic cooperation as the means for embedding the potential zero-sum game in an overarching positive-sum and win-win context.



This shift would not have been possible under the Aquino government, as it perceived the situation as neither massively hurting Philippine interests nor as a dead end. The new Philippine government of Rodrigo Duterte based its evaluation of the outcome not on the symbolic rewards of international recognition and respect, but on immediate benefits calculated in the currency of economic profit and more comfortable bilateral relations. It then took the risk of public signaling its new interpretation of the current situation as a costly dead end and also proposed resetting relations. In many respects this meant backtracking to the early years of the new millennium; i.e., ignoring the PCA ruling for the time being, shelving the conflict, and focusing on symbolic politics and economic cooperation.

Initial signals were already being made by the presidential candidate Duterte early in his campaign, and thus had no consequences for Philippine foreign policy. Yet, this early phase of signaling was crucial, because it allowed the presidential candidate to test the reaction of China without having to compromise the official principled stance established by the Aquino government. Put simply, it was a risk-free option to test whether the gamble was worthwhile. It was also an option to test the waters with respect to domestic support, which was quickly forthcoming after having been silenced by a hegemonial narrative in the previous few years. In both spheres, reactions were positive. While a host of (former) diplomats who had been sidelined under Del Rosario came out with their open support for a recalibration of foreign policy, China also signaled its willingness to respond positively to a shift. This mutual signaling significantly reduced the perceived risk taken by Duterte when he actually shifted Philippine politics as president. He could be quite confident that China would provide the necessary initial reciprocal steps to kick start bilateral relations and mend fences.

That this is not to be mistaken for compromising on Philippine claims vindicated by the PCA ruling has been repeatedly clarified by members of the administration (see for example Cayetano 2017). The PCA award is one core factor that differentiates the present status quo from the one during the early years of the new millennium. The other is the memory of the mounting costs of intransigency in a highly loaded territorial conflict. Both operate as reminders to China of what may go wrong if it overplays its hand. The current easing of tensions, the positive outcome of cooperative efforts for conflict management with the Philippines and the regional perceptions of China that are slowly shifting back to "less of a threat and more of an opportunity" should entice China to compromise in everyday practice, as long as this does not require any compromises in principle.

Given the thoroughly established myth of the South China Sea belonging in one way or another to China, shifts towards a more realistic appraisal that may allow for compromise solutions can be expected only in the distant future. This should also be accepted by the other claimants and their international supporters. However, the low-key reaction of the Chinese population to the PCA ruling (Schrader 2016; Tong 2016) should remind the Chinese leadership that such a shift can be made acceptable to the Chinese population if it is carried out in small steps over an extended period of time.

If we assume that states are learning organisms, then one of the core lessons of the past decades could be that dispute settlement is crucially dependent on timing, and that for the foreseeable future cooperative management is the best option for all parties to the conflict. For the foreseeable future, the perpetuation, deepening and broadening of bi- and multilateral communication, of confi-

dence-building measures, of mutual economic cooperation that slowly extends to disputed territories, and the establishment of joint regulatory authorities for the management of fishery and environmental protection is the most that can be expected.

For the time being the Duterte initiative has had clearly positive results in containing the threatening dynamics of a slowly escalating spiral of mutual confrontation. Subsequent developments have established a fragile new status quo from which promising opportunities have emerged for both sides. While it is still a long way back to the regional optimism that prevailed only a decade ago, at least the Philippines political practice and rhetoric, as well as the guarded optimism that is growing in the ASEAN region, show that (re-)gaining the position of a benevolent big power is not beyond the grasp of a sensible Chinese policy that focuses more on the power of persuasion and less on the power of superior might.

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PETER KREUZER //

## **DEALING WITH CHINA IN THE SOUTH CHINA SEA: DUTERTE CHANGING COURSE**

In 2013 the Philippines brought a case before the Permanent Court of Arbitration (PCA) against China over territorial sovereignty and maritime rights in the South China Sea. Admittedly, they were successful before the court, but in the aftermath the tensions between both parties intensified dramatically – and no conflict resolution was in sight. Philippine President Duterte, inaugurated in 2016, assumed a new stance. He offered to ignore the court ruling for the time being, intensified economic relations and re-established bilateral communication channels. Kreuzer presents two lessons learned in dealing with China: first, that applying too much pressure through legal instruments may increase China's resistance and, second, that China's behavior can be influenced through strategies that respond positively to the country's core needs and predicaments.

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